A

Fakhrurrazi Hasan v Public Prosecutor

B FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–289–12 OF 2012(B)
RICHARD MALANJUM CJ (SABAH AND SARAWAK), ABDULL HAMID EMBONG, SURIYADI, AHMAD MAAROP AND APANDI ALI FCJJ
C 16 NOVEMBER 2015

Criminal Law — Dangerous drugs — Trafficking — Appellant convicted and sentenced to death for offence of trafficking under s 39B(2) of the Dangerous Drugs Act 1952 ('the DDA') — Whether mens rea knowledge of drugs proven D *— Whether trial judge discounted evidence of conduct — Whether accessibility and opportunity to inspect drugs sufficient to prove knowledge — Whether custody and control proven — Whether presumption of possession under s 37(d) of the DDA activated — Whether trial judge ought to have called appellant to enter his defence for offence of possession of drugs under s 6 of the DDA and punishable under* E *s 39A(2) of the DDA — Whether appellant successfully rebutted presumption of possession — Dangerous Drugs Act 1952 ss 6, 37(d), (da), 39A(2) & 39B(2)*

The appellant was charged with the offence of trafficking in 2,681g cannabis, an offence punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('the F DDA'). The prosecution's case was that, when Detective Rosli approached the appellant and introduced himself as a police officer, the appellant appeared shocked and attempted to run away. The appellant was then apprehended, and a search was conducted. A police officer ('SP3') then examined the bag ('P10') carried by the appellant and found a folded white towel inside P10. On lifting G the towel, SP3 found a package wrapped in newspaper. SP3 unwrapped the package and found three packets of dried leaves bound in transparent plastic, which were believed to be drugs. The chemist certified the three plastic packets of dried leaves to contain 2,681g of cannabis, a dangerous drugs under the DDA. The learned trial judge found the appellant's mens rea knowledge of the H drugs premised on the circumstances that the appellant had every opportunity to inspect packets of drug in P10 and little effort required to lift the towel covering the packets of the drug. The learned trial judge then found a prima facie case of trafficking against the appellant on the basis of presumed trafficking under s 37(da) of the DDA. At the end of the trial, the appellant was I found guilty, convicted and sentenced to death. His appeal to the Court of Appeal was dismissed, hence, the present appeal. The appellant submitted that the learned trial judge had misdirected herself when she failed to consider whether the appellant's case was not a case of passive possession as opposed to presumed trafficking. It was further argued that the learned trial judge had

discounted the conduct of the appellant in arriving at the finding of knowledge on the part of the appellant, as such, this was a fit and proper case for an offence of possession under s 6 of the DDA read with s 39A(2) of the DDA. The issue for determination was whether the appellant had knowledge of the drugs in P10.

Held, allowing the appeal:

(1) The learned trial judge was not satisfied that the evidence of conduct led to the inevitable inference of guilty knowledge on the part of the appellant. The learned trial judge had discounted the evidence of conduct of looking shocked and attempting to run away. In the circumstances of the case, accessibility and opportunity to inspect alone was not sufficient to inevitably lead to the inference of knowledge. Therefore, with the evidence of conduct being ruled out, there was insufficient factual matrix for the learned trial judge to make the inference of knowledge on the part of the appellant. The prosecution had only proven that the appellant had custody and control of the bag and package containing the said drugs, activating the presumption of possession and knowledge of the nature of the dangerous drugs under s 37(d) of the DDA. Since s 37(d) had been invoked, s 37(da) could no longer be relied upon to prove trafficking. The learned trial judge could only have called upon the appellant to enter his defence for an offence of possession of drugs under s 6 of the DDA punishable under s 39A(2) of the DDA (see para 16).

(2) On the evidence, the court concluded that the appellant had not, on the balance of probability rebutted the presumption that he had possession of the dangerous drugs. The conviction on the trafficking charge was therefore set aside and substituted with a conviction for an offence of possession of dangerous drugs under s 6 of the DDA punishable under s 39A(2) of the DDA. Further, based on the submission on mitigation by the appellant and the submission on sentence by the respondent, the court sentenced the appellant to 20 years imprisonment with effect from the date of his arrest and ten strokes of whipping (see paras 16–17).

[Bahasa Malaysia summary

Perayu dituduh atas kesalahan mengedar kanabis seberat 2,681g, satu kesalahan yang boleh dihukum di bawah s 39B(2) Akta Dadah Berbahaya 1952 ('ADB'). Kes pendakwaan adalah bahawa, apabila Detektif Rosli menghampiri perayu dan memperkenalkan diri sebagai pegawai polis, perayu kelihatan terkejut dan cuba melarikan diri. Perayu kemudiannya ditangkap, dan pemeriksaan dilakukan. Seorang pegawai polis ('SP3') kemudian memeriksa beg ('P10') yang dibawa oleh perayu dan menemui tuala putih yang dilipat di dalam P10. Apabila tuala tersebut diangkat, SP3 menemui satu bungkusan surat khabar. SP3 membuka bungkusan tersebut dan mendapati

A tiga paket daun kering yang dibungkus dengan plastik lutsinar, yang dipercayai adalah dadah. Ahli kimia mengesahkan tiga paket plastik daun kering tersebut mengandungi 2,681g kanabis, dadah berbahaya di bawah ADB. Hakim bicara yang bijaksana mendapati pengetahuan mens rea perayu tentang dadah tersebut berdasarkan pada keadaan bahawa perayu mempunyai peluang untuk B memeriksa paket dadah dalam P10 dan usaha kecil yang diperlukan untuk mengangkat tuala yang meliputi paket dadah tersebut. Hakim bicara yang bijaksana kemudiannya mendapati satu kes prima facie pengedaran telah dibuktikan terhadap perayu atas dasar anggapan pengedaran di bawah s 37(da) ADB. Pada akhir perbicaraan, perayu didapati bersalah, disabitkan dan C dihukum mati. Rayuannya kepada Mahkamah Rayuan telah ditolak, oleh itu, rayuan semasa telah difailkan. Perayu telah berhujah bahawa hakim bicara yang bijaksana telah tersalah arah apabila beliau gagal untuk mempertimbangkan sama ada kes perayu tersebut bukan kes pemilikan pasif berbanding dengan kes anggapan pengedaran. Seterusnya, hakim bicara yang D bijaksana telah mengabaikan kelakuan perayu dalam mencapai dapatan pengetahuan di pihak perayu, oleh itu, ini merupakan kes yang sesuai dan patut bagi kesalahan pemilikan di bawah s 6 ADB dibaca bersama s 39A(2) ADB. Isu untuk penentuan ialah sama ada perayu mempunyai pengetahuan tentang dadah yang berada di dalam P10.

E

Diputuskan, membenarkan rayuan:

(1) Hakim bicara yang bijaksana tidak berpuas hati bahawa keterangan kelakuan tersebut membawa kepada inferens yang tidak dapat dielakkan F mengenai pengetahuan kebersalah di pihak perayu. Hakim bicara yang bijaksana telah mengabaikan keterangan kelakuan iaitu kelihatan terkejut dan cuba melarikan diri. Dalam keadaan kes semasa, kebolehcapaian dan peluang untuk memeriksa sahaja tidak mencukupi untuk membawa kepada inferens pengetahuan. Oleh itu, dengan G keterangan kelakuan diketepikan, terdapat asas fakta yang tidak mencukupi untuk hakim bicara yang bijaksana untuk membuat inferens pengetahuan di pihak perayu. Pihak pendakwaan hanya membuktikan bahawa perayu mempunyai jagaan dan kawalan ke atas beg dan bungkusan yang mengandungi dadah tersebut, ini telah mengaktifkan H anggapan pemilikan dan pengetahuan tentang jenis dadah berbahaya di bawah s 37(d) ADB. Memandangkan s 37(d) telah diguna pakai, maka s 37(da) tidak lagi boleh digunakan untuk membuktikan pengedaran. Hakim bicara yang bijaksana hanya boleh memanggil perayu untuk memasukkan pembelaannya atas kesalahan pemilikan dadah di bawah I s 6 ADB yang boleh dihukum di bawah s 39A(2) ADB (lihat perenggan 16).

(2) Berdasarkan keterangan, mahkamah memutuskan bahawa perayu tidak berjaya di atas imbangan kebarangkalian untuk menyangkal anggapan bahawa dia mempunyai milikan ke atas dadah berbahaya tersebut. Oleh

itu, sabitan atas tuduhan pengedaran tersebut diketepikan dan digantikan dengan sabitan di atas kesalahan pemilikan dadah berbahaya di bawah s 6 ADB yang boleh dihukum di bawah s 39A(2) ADB. Selanjutnya, berdasarkan hujahan mitigasi oleh perayu dan hujahan mengenai hukuman oleh responden, mahkamah menjatuhkan hukuman 20 tahun penjara berkuatkuasa dari tarikh penangkapannya dan sepuluh kali sebatan ke atas perayu (lihat perenggan 16–17).]

Notes

For cases on trafficking, see 4(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 886–1075.

Cases referred to

Abdullah Zawawi bin Yusoff v PP [1993] 3 MLJ 1; [1993] 4 CLJ 1, SC (refd)
Director of Public Prosecutions v Brooks [1974] 2 All ER 840, PC (refd)
Emmanuel Yaw Teiku v PP [2006] 5 MLJ 209; [2006] 3 CLJ 597, FC (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273, FC (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19; [2009] 1 CLJ 717, FC (refd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1; [2007] 4 CLJ 337, FC (refd)
PP v Tan Tatt Eek & Other Appeals [2005] 2 MLJ 685; [2005] 6 AMR 543, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 78(1)
Dangerous Drugs Act 1952 ss 6, 37(d), (da), 39A(2), 39B(2)
Evidence Act 1950 s 8

Appeal from: Criminal Appeal No B-05–388 of 2010 (Court of Appeal, Putrajaya)

Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the appellant.
Kwan Lisa (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Ahmad Maarop FCJ:

[1] The judgment is prepared pursuant to s 78(1) of the Courts of Judicature Act 1964, as our learned brother, Justice Apandi Ali FCJ has since resigned, upon his appointment as the Attorney General of Malaysia.

[2] The appellant was charged with the offence of trafficking 2,681g of cannabis on 7 March 2005 at about 9pm at Jalan Bandar Rawang 2, Rawang in the District of Gombak, in the State of Selangor, an offence punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('the Act'). He was tried in the High

Court, found guilty, convicted and sentenced to death. His appeal to the Court of Appeal was dismissed. Hence his appeal before us.

[3] The brief facts of the case disclosed substantially by the evidence of SP3 and SP5 are these. In 7 March 2005 at about 4pm SP3 received information regarding drug activities in Rawang. After a briefing by SP3, SP3 led a police party including SP5 to Jalan Bandar Rawang 2, Rawang. According to SP5 upon arrival at their destination at about 8.30pm, they positioned themselves in the vicinity of the shops there. The area was well lighted by street lights as well as lights from the shops. SP3 and his party took up position in front of a Kentucky Fried Chicken Restaurant ('the KFC') while SP5 and his team were positioned in front of a photo shop called Foto Zoom. At about 9pm both SP3 and SP5 testified that they sighted the appellant carrying a Marlboro Classic bag (P10) in his right hand walking alone at Jalan Bandar Rawang 2 and preparing to cross the road towards Foto Zoom. When Detective Rosli approached the appellant and introduced himself as a police officer, the appellant appeared shocked and attempted to run away. A scuffle ensued which caused the bag which the appellant was carrying to fall to the ground next to him. The appellant was apprehended and a search was conducted on his person. No illicit items were recovered from him. SP3 then examined the Marlboro Classic bag (P10) and found a folded off white towel (P14(B)) inside the bag. On lifting the towel, SP3 found a package wrapped in newspapers. SP3 unwrapped the package and found three packets of dried leaves bound in transparent plastic, which were believed to be drugs. The appellant together with the packets of dried leaves were taken to Pejabat Narkotik, IPD Rawang. The chemist certified the three plastic packets of dried leaves to contain 2,681g of cannabis, a dangerous drugs, under the the Act. At the close of the prosecution's case, the learned judge of the High Court found that the prosecution had proven a prima facie case against the appellant and called upon him to enter his defence. The appellant elected to give evidence on oath and called SD2 to testify for the defence.

[4] In his defence the appellant gave a different version of the events leading to his arrest. The appellant said that on 7 March 2005 at about 9pm, he had gone to Rawang to meet a friend named Agam. Agam was jobless and the appellant wanted take Agam to see his boss (Hussin) about a job. The appellant went to Rawang in a car driven by another friend of his named Ibrahim. When they reached Rawang, Ibrahim parked the car in front of a shop called Foto Zoom. The appellant called Agam. Agam informed the appellant that he had arrived in Rawang earlier and had just finished eating at the KFC. The appellant agreed to meet Agam at the entrance of a Pizza Hut Restaurant, nearby. Then the appellant alighted from the car, leaving Ibrahim waiting in the parked car. The appellant claimed that while walking towards the Pizza Hut, three men rushed towards him and grabbed and handcuffed him. He was

beaten and pushed to the ground. The appellant said he did not even try to struggle as his assailants were too strong. He was then taken to Ibrahim's car where he was told to squat by the side of the road. By that time Ibrahim was no longer in the car. The police examined the car and showed to the appellant a Marlboro bag which was recovered from the foot rest on the left side of the back passenger seat. The appellant said he informed the police that it was Ibrahim who had driven him to Rawang and that the bag probably belonged to Ibrahim or Hussin. The appellant claimed that he was not aware of the presence of the bag or the cannabis found in the bag.

[5] In his oral submission before us, learned counsel for the appellant told us that the appellant was relying only on one main ground (as stated in para 4(a) p 4 of the skeletal submission of the appellant) ie the learned trial judge had misdirected herself when she failed to consider whether the appellant's case was not a case of passive possession as opposed to presumed trafficking.

Learned counsel contended that this was a fit and proper case for an offence of possession under s 6 of the DDA read with s 39A(2) of the Act. Elaborating on his submission learned counsel referred to the following last four lines in the second paragraph in the ground of judgment of the learned High Court judge at p 270 of the appeal records:

> While SP3's testimony that the second accused looked shocked and attempted to run away without more cannot be taken to point undoubtedly to guilty knowledge on his part. *Parlan Dadeh v PP* [2009] 1 CLJ 717.

Learned counsel then submitted that in other words the learned trial judge discounted the conduct of the appellant in arriving at the finding of knowledge on the part of the appellant.

[6] Learned counsel next referred to the third paragraph in the grounds of judgment of the learned trial judge which appears at p 270 of the appeal record:

> However, there were other circumstances from which knowledge that the contents of the bag contained drugs could be inferred. The drugs were in a paper bag under a folded towel which bag the accused was carrying in his right hand. The readily accessible position of the drugs means that there is every opportunity for the accused to simply lift up the towel to see the packets of drugs under it. Little effort was required to lift the towel and unwrap the newspaper wrapping to uncover the drugs. Other than the towel, there were no other items in the bag. I therefore find there is sufficient evidence to infer that the first accused had mens rea knowledge of the nature of the contents of the paper bag. Since the accused has been found to have custody and control of the said drugs, as well as mens rea knowledge, prima facie the accused had possession of the drugs independent of the statutory presumption under section 37(d) of the Act. (*PP v Abdul Rahman Akif* [2007] 4 CLJ 337.)

A **[7]** Learned counsel contended that it was on that basis (ie 'every opportunity to inspect packets of drug in the bag and little effort required to lift the towel covering the packets of the drug') alone that the learned trial judge found mens rea knowledge. Learned counsel submitted that in doing so the learned trial judge was in error. He submitted that the law does not require the B appellant to inspect the bag unless there are suspicious circumstances which compel the appellant to do so. Citing an example, he argued that if a friend of his were ask to him to carry a bag to a car, he was not obliged to inspect the content of the bag. In the case before the court the prosecution did not adduce any evidence to establish those suspicious circumstances. In support of his C submission learned counsel also relied on *Public Prosecutor v Tan Tatt Eek & Other Appeals* [2005] 2 MLJ 685; [2005] 6 AMR 543.

[8] The thrust of the learned deputy public prosecutor's ('deputy') D submission in reply is that the relevant passages in the judgment of the learned trial judge referred to by the learned counsel must be considered in entirety and not in isolation. She contended that the learned trial judge was correct when she made use of the evidence of the conduct of the appellant, and the manner the drugs were packed in the bag to make inference of knowledge. In this regard E she referred to para 35 of the judgment of the Court of Appeal where the court said:

> The appellant in the instant appeal struggled with the police. He was shocked and attempted to flee. During the struggle, the bag fell to the ground. Together with other factors as to the manner in which the drugs were packed and kept in the bag, F the learned trial judge had rightly inferred and came to the conclusion that the appellant had knowledge of the same and thus possession was proven.

[9] The learned deputy urged us to use the inherent jurisdiction of the court to consider the whole of the evidence, of which she contended, had established G that the appellant was caught red handed trafficking in dangerous drugs.

OUR DECISION

[10] The learned trial judge found a prima facie case of trafficking against the H appellant on the basis of presumed trafficking under s 37(da) of the DDA, as the evidence before her established that the weight of the proscribed drugs namely cannabis in this case, was 2,681g which was in excess of the statutory minimum of 200g. Before the presumption of trafficking under s 37(da) is invoked the learned judge must make an affirmative finding of possession I based on the evidence. She cannot make use of s 37(d) of the Act (see *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273). On the evidence before her she had no difficulty in finding that the appellant had custody and control of the three packets containing the proscribed drugs. But mere custody and control is not sufficient to prove possession under the DDA.

The appellant must be proven to have knowledge of the drugs. In this regard in the leading case of *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337, Arifin Zakaria FCJ (as His Lordship then was) delivering the judgment of this court said at pp 7–9 (MLJ); p 347–349 (CLJ):

> The incontrovertible facts as found by the trial court was that the three packages were found in the car driven by the respondent. He was the only person in the car at the material time. One package was found under the driver's seat and two packages under passenger's seat. PW8 gave evidence that the car was in the possession of the respondent for more than seven months prior to his arrest. In the circumstances we think the trial judge was right to hold that at the material time the three packages were in the custody and control of the respondent. Indeed the Court of Appeal agreed with the trial judge. *But mere custody and control is not sufficient to establish possession for the purpose of the Act. There has to be established knowledge of such drug by the respondent.* In *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237; [1956] 1 LNS 17 Thomson J dealt with the issue of possession under the Common Gaming Houses Ordinance 1953 and at p 239 he observed:
>
> > 'Possession' itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Ed, p 304):
> >
> > > A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.
>
> To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. It must also be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some *animus possidendi*. *Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case.* If a watch is in my pocket then in the absence of anything else the inference will be clear that I intend to deal with it as if it were my own and accordingly I am in possession of it. On the other hand, if it is lying on a table in a room in which I am but which is also frequently used by other people then the mere fact that I am in physical proximity to it does not give rise to the inference that I intend to deal with it as if it belonged to me. There must be some evidence that I am doing or having done something with it that shews such an intention. Or it must be clear that the circumstances in which it is found shew such an intention. It may be found in a locked room to which I hold the key or it may be found in a drawer mixed up with my own belongings or it may be found, as occurred in a recent case, in a box under my bed. *The possible circumstances cannot be set out exhaustively and it is impossible to lay down any general rule on the point. But there must be something in the evidence to satisfy the court that the person who is physically in a position to deal with the thing as his own had the intention of doing so.*

[15] And further down on the same page he added:

> Here again knowledge cannot be proved by direct evidence, it can only be proved by inference from the surrounding circumstances. Again the possible variety of circumstances which will support such an inference is infinite.
>
> [16] It is trite that what constitutes 'possession' under s 37 of the Act is a question of law (see *Yee Ya Mang v Public Prosecutor* [1972] 1 MLJ 120; [1971] 1 LNS 156 and *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585; [1987] 1 LNS 72). It is however a question of fact whether in a given case a person can be said to be in possession of something. (Emphasis added.)

[11] Thus the law is clear and well-settled. Proof of knowledge is very often a matter of inference. The material from which the inference of knowledge can be drawn varies from case to case. It would be sufficient for the prosecution to prove facts from which it could be properly inferred that the accused had the necessary knowledge (see *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19 at p 39; [2009] 1 CLJ 717 at p 741, per Augustine Paul FCJ). In *Emmanuel Yaw Teiku v Public Prosecutor* [2006] 5 MLJ 209 at p 215–216; [2006] 3 CLJ 597 Richard Malanjum FCJ (now CJ (Sabah and Sarawak)) said at pp 605–606:

> It should be borne in mind *that proof of intention* or *knowledge is* generally *inferred from proved facts and circumstances*. It is difficult to do so by other means unless there is a clear admission by the person himself. This difficulty had been acknowledged in the case of *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237; [1956] 1 LNS 17 when Thomson J said this (at p 239):
>
> > Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case.
>
> (See also *Wong Nam Loi v Public Prosecutor* [1997] 3 MLJ 795; [1998] 1 CLJ 37). (Emphasis added).

[12] The crucial issue which lies at the heart of this appeal is whether the appellant had knowledge of the drugs in the Malboro bag. This brings us to certain passages in the judgment of the learned trial judge which became the focus of learned counsel's complaint as well as the submission by the learned deputy. Indeed the effect of these passages appearing on pp 269–271 of the appeal record, which we set out in full below, is pivotal to the outcome of this appeal:

> Mens Rea
>
> Knowledge (Mens rea possession)
>
> In *PP v Badrulsham bin Baharom* [1988] 2 MLJ 585, Lim Beng Choon J approved of the definition of knowledge in *Saad bin Ibrahim v PP* [1968] 1 MLJ 159 thus:
>
> > ... Possession which incriminates must have certain characteristics. The possessor must be aware of his possession, must know the nature of the thing

possessed and must have the power of disposal over it. Without these characteristics possession raised no presumption of mens rea.

The element of knowledge cannot be proved by direct evidence but is to be inferred from the surrounding circumstances. (*Chan Pean Leon v PP* [1956] 1 MLJ 237). From the evidence of SP3, on being apprehended, the accused had looked shocked and attempted to run away, resulting in a scuffle. The paper bag the accused was holding had fallen proximate to the accused. *While SP3's testimony that the second accused looked shocked and attempted to run away without more cannot be taken to point undoubtedly to guilty knowledge on his part. Parlan Dadeh v PP* [2009] 1 CLJ 717.

However, there were other circumstances from which knowledge that the contents of the bag contained drugs could be inferred. The drugs were in a paper bag under a folded towel which bag the accused was carrying in his right hand. The readily accessible position of the drugs means that there is every opportunity for the accused to simply lift up the towel to see the packets of drugs under it. Little effort was required to lift the towel and unwrap the newspaper wrapping to uncover the drugs. Other than the towel, there were no other items in the bag. I therefore find there is sufficient evidence to infer that the first accused had mens rea knowledge of the nature of the contents of the paper bag. Since the accused has been found to have custody and control of the drugs, as well as mens rea knowledge, prima facie the accused had possession of the drugs independent of the statutory presumption under section 37(d) of the Act. (*PP v Abdul Rahman Akif* [2007] 4 CLJ 337.)

As for the offence of trafficking, since the amount of cannabis — 2681 gram is far in excess of 200 gram, the statutory presumption of trafficking under section 37(da) of the Act can be invoked. I therefore find that a prima facie case of trafficking has been established against the accused. I therefore ordered the accused to enter his defence.

[13] Evidence of conduct may become material evidence from which inference of knowledge can be made by the court. The law relating to conduct which is admissible under s 8 of the Evidence Act 1950, was explained at length by this court in *Parlan bin Dadeh v Public Prosecutor* where Augustine Paul FCJ speaking for this court said:

[28] Evidence of conduct is admissible under *s 8 of the Evidence Act 1950 ('s 8')* which reads as follows:

(1) Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

(2) The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding or in reference to any fact in issue therein or relevant thereto, and *the conduct of any person an offence against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact,* and whether it was previous or subsequent thereto.

[29] *Illustration (i) to s 8* reads as follows:

A is accused of a crime.

The facts that after the commission of the alleged crime he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it are relevant.

[30] In commenting on the admissibility of evidence of conduct under s 8 *Sarkar on Evidence* (15th Ed) says at p 175:

The conduct of party to a proceeding or his agent in reference to such proceeding at the time when the facts occurred out of which the proceeding arises, or in reference to any fact in issue or relevant fact, or *the conduct of the complainant, is relevant; but the condition precedent to its admissibility as 'conduct' is that it must directly influence or be influenced by a fact in issue or relevant fact and such conduct does not include action resulting from other causes or circumstances.* It must be the essential complement of the act done or refused to be done. Conduct includes antecedent or subsequent conduct involving both actions and statements.

And at p 194:

What is meant by the words, if such conduct influences or is influenced by any fact in issue or relevant fact, is that there must be a direct or immediate relation between the conduct and the fact in issue. Conduct which is brought about by some other agency though connected with the facts in issue is not relevant conduct.

...

[32] Evidence of conduct admissible under *s 8* may be explained as provided in *s 9 of the Evidence Act 1950 ('s 9')* which reads as follows:

Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened or which show the relation of parties by whom any such fact was transacted, are relevant so far as they are necessary for that purpose.

[33] *Illustration (c) to s 9* reads as follows:

A is accused of a crime.

The fact that soon after the commission of the crime A absconded from his house is relevant under section 8 as conduct subsequent to and affected by facts in issue.

The fact that at the time when he left home he had sudden and urgent business at the place to which he went is relevant as tending to explain the fact that he left home suddenly.

The details of the business on which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent.

...

[35] The applicability of the two sections was considered in *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649 where the High Court said at pp

721–722:

I must add that evidence of conduct which allows inferences to be drawn, as in the two cases referred to, is admissible under *s 8 of the Evidence Act 1950*. A typical example of such conduct is the absconding or flight of a person after the commission of an offence. But evidence of mere absconding or flight is not such a vital circumstance which can be considered to show that the absconder was having any guilty mind (see *Bhagat Bahadur v State* [1996] Cri LJ 2201). *Such conduct must be considered in the totality of the evidence adduced (see Mansor bin Mohd Rashid's case).*

For it to be capable of amounting to an admission of guilt there must be a nexus between his conduct, his flight and the offence in question. As Lord Ackner said in *Chan Kwok Keung & Anor v The Queen* [1990] 3 CLJ Rep 386; [1990] 1 CLJ 411 at p 413:

> It is common ground that conduct, and in particular the flight of an accused after an offence has been committed, may be tantamount to an admission by him of his guilt of that offence and as such admissible evidence. ...
>
> In order for flight to be capable of amounting to an admission of guilt there must be some evidence which establishes a *nexus* between *the conduct* of the accused, his flight or concealment and the offence in question. ...

Evidence of such conduct can be explained away by the accused as provided by s 9 of the Evidence Act 1950 (see *Ling Ngan Liong v Public Prosecutor* [1964] MLJ 20; *Choo Chang Teik & Anor v Public Prosecutor* [1991] 3 MLJ 423; [1991] 1 CLJ Rep 54; [1991] 3 CLJ 2387). However, the onus is on the accused to explain his conduct. Thus in *Mansor bin Mohd Rashid*'s case, the Federal Court held that the intention of the accused persons to flee, when considered in the light of the evidence adduced, justifiably necessitated some explanation from them. A failure to put forward any explanation of absconding after the occurrence of a crime is a point in favour of the prosecution (see *Parmeshwar v R* AIR [1941] Orissa 517). (Emphasis added.)

[14] His Lordship then said:

The law relating to evidence of conduct is thus patent. *If there is no evidence to show that the conduct is influenced by any fact in issue or relevant fact as required by s 8 then it is not admissible as it would then be an equivocal act justifying inferences favourable to the accused being drawn. If it satisfies the requirement of s 8 it is admissible.* It must be observed that the degree of proof required to establish evidence of conduct would depend on the nature of the conduct. Conduct like the flight of an accused is a more positive act and is easily established. On the other hand conduct like the accused looking stunned, nervous, scared or frightened is very often a matter of perception and more detailed evidence may be required. Once admitted the court cannot resort to any other explanation for the conduct or draw inferences on its own accord to render it inadmissible. The onus is on the accused to explain his conduct pursuant to s 9. Such explanation must not be in their barest possible form, but with a

reasonable fullness of detail and circumstance (see *R v Stephenson* [1904] 68 JP 524). (Emphasis added.)

[15] His Lordship then referred to *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1; [1993] 4 CLJ 1 and *Director of Public Prosecutions v Brooks* [1974] 2 All ER 840 both of which are the oft cited authorities on the evidence of conduct. His Lordship explained the rationale of the court in explaining away the conduct of the accused in running away in *Abdullah Zawawi bin Yusoff v Public Prosecutor*, and the reason why in *Director of Public Prosecutions v Brooks* the conduct of running away from the van was held against the accused:

> It is now appropriate to consider the rationale of the court in explaining the conduct of the accused in running away in *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1; [1993] 4 CLJ 1 which formed the basis of the submission of the appellant. In that case the drugs were found in a house occupied by the accused, his wife and a third person. The court considered the evidence of possible access to the house by others, and in distinguishing the case from *Director of Public Prosecutions v Brooks* [1974] 2 All ER 840, held that the conduct of the accused in running away was equally consistent with him having been in a state of pure panic even though he did not offer any explanation himself. On the other hand in *Director of Public Prosecutions v Brooks* [1974] 2 All ER 840 the accused was in the driver's seat of a stationary van with several others. There were drugs in the van. When the police approached the van all of them ran. The conduct of the accused in running away was held against him. The difference in both the cases is that in *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1; [1993] 4 CLJ 1 *there was no evidence to show that the act of the accused in running away was influenced by any fact in issue or relevant fact within the meaning of s 8 in view of the possibility of access to the house by others*. It is therefore not admissible on this ground as it is equivocal thereby justifying an inference in favour of the accused being drawn and ought to have been so ruled at an earlier stage of the trial. The case of *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1; [1993] 4 CLJ 1 is therefore authority only to this extent. On the other hand in *Director of Public Prosecutions v Brooks* [1974] 2 All ER 840 there was evidence to show that the drugs were in the physical custody and control of the accused and his conduct of running away thus comes, in the Malaysian context, within the meaning of s 8. It is therefore admissible and cannot be explained away by the court itself by offering an explanation which is consistent with the innocence of the accused. The explanation must be offered by the accused himself as required by s 9.
>
> In this case the reaction of the appellant in looking stunned or shocked upon being approached by the police is clearly admissible under s 8 since it has a direct bearing on the fact in issue as the drugs found were tucked away in the front of the jeans worn by him. The explanation for his reaction must therefore be offered by he himself as required by s 9. The court cannot, on its own, offer an explanation for his reaction. However, in his defence the appellant did not offer any explanation at all for his reaction upon being approached by the police. It can therefore be validly used as evidence against him. (Emphasis added.)

[16] It is therefore essential for the trial judge to come to a finding whether the conduct relied upon to establish knowledge is influenced by or is relevant to a fact in issue under s 8 of the Evidence Act as explained in *Parlan bin Dadeh v Public Prosecutor*. It is for the trial judge to make a finding whether the conduct of running away (to give a simple typical example), is caused by the fact that the accused is caught having in his custody and control of the proscribed drugs. In other words, reverting to the present case, the learned trial judge must be convinced that the evidence adduced by the prosecution established the nexus between the conduct of the appellant and the three packets of drugs in his custody and control. It goes without saying that she must before that make a finding whether the conduct relied upon by the prosecution (ie looking shocked and attempting to run away) had been proven to her satisfaction on the evidence. In this case there is nothing to show that the learned trial judge had dealt with the evidence of the conduct relied upon by the prosecution in the way explained earlier. It appears to us that she was not satisfied that the evidence of conduct led to the inevitable inference of guilty knowledge on the part of the appellant. We agree with learned counsel for the appellant that the learned trial judge had discounted the evidence of conduct of looking shocked and attempting to run away. The learned trial judge then referred to other circumstances to infer knowledge. We have said that inference of knowledge can be made from proved facts and circumstances (see *Emmanuel Yaw Teiku v Public Prosecutor*). The learned trial judge had said that the drugs were in a paper bag under a folded towel which the appellant was carrying. These are the basic facts upon which her opinion on accessibility of the drugs to the appellant and his opportunity to inspect appeared to have been made. But those basic facts are not quite accurate, because the drugs were not just under the towel. The proven facts are that under the towel was a package wrapped with newspaper, and after the package was unwrapped, SP3 found three packets of dried leaves of cannabis bound in transparent plastic. Accessibility and opportunity to inspect are the learned trial judge's opinion. So is her remark about little effort being required. In our view, accessibility and opportunity to inspect may be very material consideration in the determination of the physical element of custody and control. When someone is caught carrying a bag containing package of dangerous drugs, the element of accessibility to the thing and the opportunity to inspect is invariably established because of his proximity to the bag and the packages. However, in the absence of additional evidence, for example of him taking a peek at the drugs, it does not necessarily mean that he must have knowledge of the drugs, unless there is a presumption in the law to warrant knowledge to be presumed, and indeed in our view, this is where the presumption under s 37(d) of the Act may be called into play to presume knowledge of the nature of the thing in the bag. In our view, in the circumstances of this case, accessibility and opportunity to inspect alone is not sufficient to inevitably lead to the inference of knowledge on the part of the appellant. We therefore find that with the evidence of conduct being ruled out by the learned trial judge, there was insufficient factual matrix for her to make

A the inference of knowledge on the part of the appellant. On the proven facts and circumstances of this case the prosecution has only proven that the appellant had custody and control of the bag and package containing the proscribed drugs, activating the presumption of possession and knowledge of the nature of the dangerous drugs under s 37(d) of the Act. Since s 37(d) has
B been invoked, s 37(da) could no longer be relied upon to prove trafficking.The learned trial judge could only have called upon the appellant to enter his defence for an offence of possession of the drugs under s 6 and punishable under s 39A(2) of the Act. We have considered the defence of the appellant which we have set out earlier. On the evidence we have no hesitation in
C concluding that the appellant has not, on the balance of probability rebutted the presumption that he had possession of the dangerous drugs. In the result we set aside the conviction on the trafficking charge, and substitute it with a conviction for an offence of possession of dangerous drugs under s 6 punishable under s 39A(2) of the Act. The appellant's appeal is thus allowed to
D that extent.

[17] After considering the mitigation submitted by learned counsel for the appellant and the submission on sentence by the learned deputy, we sentenced the appellant to imprisonment for a term of 20 years with effect from the date
E of his arrest and ten strokes of whipping.

Appeal allowed.

Reported by Dzulqarnain Ab Fatar

F

G

H

I